No. 87-1634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHOTOTRON CORPORATION,

Petitioner,

v.

EASTMAN KODAK COMPANY,
FUQUA INDUSTRIES, INC., AND
COLORCRAFT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Phototron's request for a preliminary injunction to prevent the combination of the photofinishing businesses of Kodak and Colorcraft been rendered moot by the completion of that combination?

2. Does Phototron have standing under the antitrust laws to seek a preliminary injunction against the combination of the photofinishing businesses of Kodak and Colorcraft, two of its competitors, where it failed to establish a likelihood that the combination would engage in predatory conduct directed at Phototron?

LIST OF PARTIES

Phototron Corporation

Eastman Kodak Company

Subsidiaries and affiliates, other than wholly-owned subsidiaries, of Eastman Kodak Company:

Miller Bros. Hall & Company Limited
Photofinishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Stuart Photo Services Limited
Taylors Dev. & Printing Works Limited
Consumer Developments Limited
City Photo Limited
Ordinant S.A.R.L.
Verbatim Commercial Ltd.
P. T. Sterling Products Indonesia
Sterling Yamanouchi Pharmaceutical, Inc.
Dainichiseika-Sterling Co., Ltd.
Inrock Chemical Co., Ltd.
Sterling Drug Korea Limited
Sterling Products (Ghana) Limited
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Limited
Mackwoods-Winthrop Limited
Qualex Inc.*

Fuqua Industries, Inc.

Qualex Inc. is a non-wholly-owned subsidiary of Fuqua Industries, Inc.*

Colorcraft Corporation

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* Qualex is 51% owned by Fuqua Industries, Inc. and 49% owned by Eastman Kodak Company

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ABBREVIATIONS

"Phototron" refers to petitioner, Phototron Corporation

"Kodak" refers to respondent Eastman Kodak Company

"Fuqua" refers to respondent Fuqua Industries, Inc.

"Colorcraft" refers to respondent Colorcraft Corporation

"Qualex" refers to Qualex Inc., the entity that resulted from the combination of Kodak's and Colorcraft's photofinishing businesses

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BRIEF IN OPPOSITION

Respondents respectfully pray that the petition for writ of certiorari be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 842 F.2d 95. The typescript opinion of the court of appeals, reproduced as Appendix A to the petition for writ of certiorari (pp. A-1 – A-10) has been corrected by the court; the corrections in the opinion are reflected in the report at 842 F.2d 95, and in the opinion as reproduced in Appendix 1 hereto (cited herein as "A" followed by the relevant page number).

JURISDICTION

The courts below had jurisdiction of the subject matter, and the petition was timely filed in this Court. The subject matter of the petition, however, is moot.

STATEMENT OF THE CASE

Phototron operates wholesale photofinishing facilities that develop and print film exposed by amateur photographers. Before the formation of Qualex on March 29, 1988, Kodak and Colorwatch operated separate wholesale photofinishing facilities that competed with Phototron in certain locations. On March 29, those separate Kodak and Colorcraft operations were combined into Qualex. It is that combination which Phototron sought to enjoin; and it is the now moot preliminary injunction against the combination which is the subject of this petition.

Amateur photographers have several options for having their film developed. For one, they can take their film to retail establishments, such as camera, grocery, drug, and discount stores, that accept film for processing. Some of these retailers develop film themselves either on their premises or in off-site, captive laboratories. Others use wholesale photofinishers who pick up and develop the film, and then return the prints and negatives to the retailer. Consumers can also send their film by mail directly to processing laboratories that specialize in mail-order work. Or they can select the fastest growing segment of the photofinishing industry — retail minilabs.[1] Competition for the consumer's film process-

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[1] Minilabs are small retail outlets that specialize in photofinishing services from on-premises processing equipment.

There were virtually no minilabs in operation in 1980; today there are over 12,000. During the 1983-1986 period, minilabs grew from

ing business is intense among all of these businesses, and each directly affects the competitive behavior of the others.

Entry into this changing and highly competitive photofinishing market is both easy and rapid. All that is required to build a new wholesale-type processing laboratory is a relatively small commercial space and readily available equipment. Such a new wholesale-type laboratory can be completed in two to three months at a cost of $450,000. A minilab can be completed even faster for as little as $30,000. Adding additional equipment to existing facilities is even easier than construction of a new laboratory and often does not require additional space. Finally, entry can and does occur when vertically integrated laboratories serving affiliated retail outlets expand to solicit non-affiliated retail accounts.

Against this backdrop of vigorous competition and easy entry, Kodak and Fuqua agreed in the fall of 1987 to combine Colorcraft's and Kodak's photofinishing facilities in a new venture to be owned 51 percent by Fuqua and 49 percent by Kodak. On December 7, 1987, Kodak and Fuqua filed premerger notification materials with the Antitrust Division of the Department of Justice and the Federal Trade Commission pursuant to the Hart-Scott-Rodino Act. On December 24, 1987, the FTC cleared the merger, granting early termination of the statutory 30-day waiting period. The FTC's decision reflected the minimal effect the transaction would have on market concentration and competition.

The Kodak-Colorcraft transaction was originally scheduled to close on January 28, 1988. Seeking to block the closing,

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11 percent to 30 percent of total photofinishing as measured in value terms and from 6 percent to 22 percent as measured in terms of film processed.

Phototron filed this suit on December 21, 1988, alleging violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 7 of the Clayton Act, 15 U.S.C. § 18; and a pendent claim under Texas law. In addition to damages, Phototron requested preliminary and permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26.

On January 21, 1988, Phototron moved for a preliminary injunction enjoining Kodak and Colorcraft from combining their photofinishing operations. After conferences with the district court, respondents agreed to delay the closing until after a hearing, set for February 5, 1988 on Phototron's application for a preliminary injunction. Pursuant to the parties' agreement, the hearing consisted of oral argument based upon affidavits and exhibits. After the February 5 hearing, the transaction was again postponed at the request of the district court to February 23, 1988.

On February 22, 1988, the district court filed a Memorandum Opinion and Order. Although admitting that the question was "close," the district court granted Phototron's application for a preliminary injunction. The district court found that Phototron had established standing under the antitrust laws to challenge the proposed merger by sufficiently pleading and proving that respondents had engaged in predatory pricing aimed at Phototron, and that the transaction would "enable" the combined entity to continue such practices in the future.[2]

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[2] In holding that the transaction was likely to violate the antitrust laws, the district court excluded from the market the competition from all sources of photofinishing other than wholesale photofinishing and ignored the undisputed evidence of easy entry. When all sources of photofinishing are considered, Kodak and Colorcraft each accounted for approximately 10 percent of the amateur photofinishing business in the United States. There are fifty other

Respondents immediately appealed from the district court's decision and moved for an expedited appeal, which was granted by the court of appeals.[3] On March 28, 1988, the court of appeals issued its opinion reversing the district court's preliminary injunction on the ground that petitioner lacked standing to obtain such an injunction.

The court of appeals concluded that the evidence submitted by petitioner to the district court was insufficient to establish a credible threat of predatory behavior by the combined Kodak-Colorcraft venture, and indeed affirmatively demonstrated that no such threat was present. 842 F.2d at 100 (A 7-8). The court of appeals correctly read *Cargill, Inc v. Monfort of Colorado, Inc.*, 479 U.S. ____, 107 S.Ct. 484 (1986), as placing strict limits on the ability of private

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large photofinishing firms in the United States, none with a market share higher than 2.54 percent. The Kodak-Colorcraft transaction raised the level of market concentration, measured by the Herfindahl-Hirschman Index, only from about 400 to 600 or 700 — still well below the 1,000 "safe harbor" point for unconcentrated markets in the Department of Justice Merger Guidelines §§ 3.1, 3.11(a), 49 Fed. Reg. 26827, 26830-31 (1984).

Because of the lack of market concentration after the transaction, as well as the ease of entry or expansion into the market, it would be impossible for the new company formed by the Kodak-Colorcraft combination either to raise prices above competitive levels or to wage a successful predatory pricing campaign.

Because of its ruling on standing, the court of appeals did not reach the issue of market definition. Its discussion of the options available to consumers, however, suggests that it questioned the district court's artificially narrow market definition. See 842 F.2d at 94 (A 2).

[3] Respondents' motion was based on undisputed evidence that the proposed transaction was unlikely to survive unless it could close in the period between the Christmas rush and the spring photofinishing surge.

antitrust plaintiffs to challenge combinations between their competitors. Contrary to petitioner's assertion, the court did not hold that a competitor may not challenge "monopolistic conduct forcing it from the market." (Petition at i) Rather, it found insufficient record evidence that the challenged venture would engage in anticompetitive conduct that would force petitioner from the market or otherwise cause an antitrust injury to it.[4]

Apparently recognizing that further delay would likely cause the transaction to fail and thereby thwart its decision, the court of appeals *sua sponte* directed that the mandate issue forthwith.[5] When respondents learned on March 29, 1988 that the mandate had issued, they proceeded to consummate the merger that same day. The following morning, respondents issued a press release announcing the merger and advised the court below and petitioner, each by telecopied letter, that the transaction had closed.

On March 30, 1988, after the mandate had issued and respondents' transaction had closed, petitioner filed its mo-

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[4] Petitioner relies heavily on a phrase from the court of appeals typescript opinion that Phototron had to show a "likelihood of *having suffered* an antitrust injury." (Petition at 5, 14) (emphasis added) In its final published opinion the court below corrected the phrase to require that a competitor show a "likelihood of suffering an antitrust injury." 842 F.2d at 98 (A 4).

The correction is consistent with the court's Conclusion requiring "a substantial likelihood that the plaintiff *will be* injured." 842 F.2d at 102 (A 12) (emphasis added).

[5] Without knowledge of the court's order, respondents on March 28, 1988 served, and the next morning filed, a motion for immediate issuance of the mandate.

tion for recall of the mandate. The court denied the motion on March 31, 1988.

On March 31, 1988, while petitioner's motion for recall of the mandate was still pending in the court of appeals, petitioner filed an application in this Court for recall and stay of the mandate pending consideration of petitioner's certiorari petition to be filed April 4, 1988. Petitioner's application failed to disclose that the transaction petitioner sought to enjoin had already been closed. Justice White entered a temporary order recalling and staying the mandate pending receipt of responses to petitioner's application. Respondents immediately filed a motion to vacate the temporary stay, informing the Court that the transaction had in fact already been closed. The following morning, on April 1, 1988, respondents filed a complete response to petitioner's application.

Justice White then vacated his earlier order and denied petitioner's application for a stay in all respects. In denying petitioner's application, Justice White noted that the transaction had actually been closed before the temporary stay was issued and that he had not been aware of that closing at the time he entered the stay. On April 1, 1988, petitioner reapplied to Justice Brennan to recall and stay the mandate. That reapplication was denied on April 4, 1988.

The petition for writ of certiorari was filed on April 4, 1988.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The subject matter of this petition, petitioner's request for a preliminary injunction restraining the combination of the wholesale photofinishing businesses of Kodak and Colorcraft, has been rendered moot by the completion of that combination. For this Court to take the case to decide if the court of

appeals correctly denied petitioner's standing to seek such an injunction would result in an advisory opinion affecting no rights of the parties. Under Article III of the Constitution this Court will not decide moot questions, and the petition should be denied on the ground of mootness alone.

Quite apart from mootness, however, the questions presented by petitioner are not appropriate for review on certiorari. Faithfully applying this Court's recent decision in *Cargill*, the court of appeals found that petitioner had failed to establish a likelihood that the proposed combination would engage in any kind of predatory conduct that would harm petitioner. Petitioner's true disagreement with this holding is not on the law, but on the court's interpretation of the evidence. This case is fact specific, and the question presented is not ripe for review because it involves a recent decision of this Court as to which there is no conflict between circuits. Nor will the decision of the court of appeals impair private enforcement of the merger laws because, in addition to competitors who do have standing under *Cargill* in an appropriate case, both customers and suppliers of a merged entity continue to have the incentive and the right to sue. Accordingly, this case is inappropriate for review in this Court.

ARGUMENT

I. THE QUESTIONS PRESENTED BY PETITIONER ARE MOOT

The order of the district court that is the subject of this petition preliminarily enjoined respondents from "consummating their agreement to combine the photofinishing opera-

tions of Kodak and Colorcraft." (Petition, App. B, at A-32)[6] That agreement was consummated after the judgment and mandate of the court below had issued and before the filing of the petition for writ of certiorari.[7] The question of whether the preliminary injunction should have issued is accordingly moot.[8]

The requirement of a justiciable controversy is at the core of the Court's power under Article III of the Constitution. The Court will not decide moot questions. *University of Texas v. Camenisch*, 451 U.S. 390 (1981). The Court has made clear that an actual live controversy must exist at all stages of appellate or certiorari review, not merely at the time the complaint is filed. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

The principal consideration in the analysis of mootness is "whether any effective purpose can still be served by a specific remedy." 13A Wright, Miller & Cooper, *Federal*

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[6] Petitioner did not appeal from the order entered by the district court and cannot argue for a broader injunction in this Court. The possibility that petitioner might ask the district court to grant further relief does not avoid the mootness of the appeal of the relief that *was* granted. *In re Cantwell*, 639 F.2d 1050, 1054 (3rd Cir. 1981).

[7] The facts concerning the closing of the transaction and the subsequent steps that have been and are being taken by respondents effecting the consolidation of their operations are set forth in the affidavits of George Bears and Lawrence Klamon, which were filed by respondents in this Court on April 1, 1988 in support of their Response to Motion for Stay or Recall of Mandate.

[8] Counsel have a duty to advise the Court of the mootness of an issue, no matter when it arises. *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985). The appropriate method for a respondent to raise the issue of mootness is in its response to the petition for certiorari. Sup. Ct. R. 22.3

Practice and Procedure § 3533.1 (1984). The federal courts generally will dismiss an appeal as moot "when events occur during the pendency of the appeal which prevent the appellate court from granting any effective relief." *In re Cantwell*, 639 F.2d 1050, 1053 (3rd Cir. 1981); *accord In re Combined Metals Reduction Co.*, 557 F.2d 179, 187 (9th Cir. 1977). "Thus, where, pending appeal, an act or event sought to be enjoined has been performed or has occurred, an appeal from the denial of the injunction will be dismissed as moot." *In re Cantwell*, 639 F.2d at 1054.[9] These principles were recently applied in the merger context in *FTC v. Owens-Illinois, Inc.*, No. 88-5048 (D.C. Cir. April 8, 1988) (appeal from denial of preliminary injunction moot where merger sought to be enjoined under antitrust laws was already consummated).

The present case falls squarely within the above principles. The event sought to be enjoined was the consummation of the agreement for the proposed combination. With the approval of the court of appeals, that consummation has occurred. Accordingly, for this Court to take this case to decide if the court of appeals was correct or incorrect in its decision

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[9] Other cases in this Court and in the circuits support this basic proposition. *See, e.g., Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (election had already been held); *Sawyer v. Pioneer Mill Co.*, 300 F.2d 200, 202 (9th Cir.), *cert. denied*, 371 U.S. 814 (1962) (action to prevent use of proxies solicited through allegedly misleading proxy statement rendered moot by holding of stockholder meeting and approval of merger); *Fink v. Continental Foundry & Machine Co.*, 240 F.2d 369, 374 (7th Cir.), *cert. denied*, 354 U.S. 938 (1957) (action by stockholders to enjoin sale of assets and liquidation rendered moot when sale was completed pending appeal); *Brill v. General Industrial Enterprises Inc.*, 234 F.2d 465, 469 (3d Cir. 1956) (stockholders' action to enjoin sale of corporate assets which allegedly violated antitrust laws rendered moot by consummation of sale after dismissal and prior to filing of appeal).

would result in an advisory opinion affecting no rights of the parties.

This case does not involve the recognized exception to mootness for issues that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). That exception is typically applied where government regulations are likely to be enforced repeatedly, but involve subject matters that inherently have such a short time dimension that appellate review is impossible during the pendency of any particular dispute. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). No such consideration is pertinent to the present case.[10] In light of the large number of merger cases, there will no doubt be many cases (such as *Cargill* itself) presented for review that are not moot.

Petitioner argues that respondents acted improperly in closing the transaction before the district court had physically received the mandate. (Petition at 6, n. 7) The mandate, however, neither required nor contemplated any action by the district court; the court of appeals specifically "looked beyond a remand," in order "to render a final decision" on the preliminary injunction issue. 842 F.2d at 99 (A 5). The order of the court of appeals reversing the preliminary injunction was thus effective when the mandate issued. Respondents were under no obligation to wait until the United

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[10] The venture between Kodak and Colorcraft is a highly individualized business transaction. Petitioner has made no showing that any further transaction of this type is likely to occur or that petitioner would be affected if it did occur. The evading review exception cannot be used to avoid mootness based on "speculative contingencies." *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1974) (citing cases).

States Postal Service delivered the piece of paper to the district court. If the mootness of this proceeding is to be attributed to any party, it is Phototron which failed to seek a stay more promptly.[11]

Petitioner's standing is not properly before this Court for review, and the petition should be denied on the ground of mootness alone.

II. The Questions Presented Are Not Appropriate For Review

Even if the questions presented by petitioner were not moot, those questions are not appropriate for review by the Court. This is the first court of appeals case since the Court's decision in *Cargill* to apply the rule and the antitrust policy of that decision; accordingly it presents no conflict with any decision of another lower court. It is certainly far too early for the Court to reconsider *Cargill,* which is petitioner's true objective. Moreover, the decision below is fact specific. The court of appeals denied petitioner's standing to obtain a preliminary injunction because of the failure of petitioner's evidence to bring petitioner within *Cargill's* requirements. The case does not present any issue of the kind reflected in Supreme Court Rule 17, any new issue of national policy, or any question concerning interpretation or application of the Court's holding in *Cargill* that would justify its attention.

Petitioner argues that the court of appeals "fundamentally misapprehended" *Cargill.* (Petition at 8) Demonstrably it did

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[11] Such a failure is a relevant consideration in evaluating mootness. *See In re Combined Metals Reduction Co.*, 557 F.2d 179, 190 (9th Cir. 1977). At the conclusion of oral argument in the court of appeals, respondents requested that the court act as promptly as possible for the reasons set forth in note 3. Petitioner made no request of the court concerning issuance of the mandate.

not. In *Cargill* this Court extended its earlier decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) to actions for injunctive relief under Section 16 of the Clayton Act, holding that a private plaintiff seeking an injunction "must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' " 107 S. Ct. at 491 (quoting *Brunswick*, 429 U.S. at 489). Thus, "a threat of a loss of profits stemming from the possibility that [the defendant], after the merger, would lower its prices to a level at or only slightly above its costs" would not constitute antitrust injury. 107 S. Ct. at 491-93.

Repeating the frequently-cited admonition that the antitrust laws were enacted for "the protection of *competition*, not *competitors*," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original), the Court observed in *Cargill* that "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws" and that lower prices as a result of competition were not such a practice. 107 S. Ct. at 492. The Court therefore concluded that a competitor may only sustain antitrust injury and thus have the requisite standing to seek injunctive relief under the antitrust laws when the party is threatened with anticompetitive practices directed at it, such as predatory pricing by the merged firm. 107 S. Ct. at 495.

In the instant case, the court of appeals properly applied this Court's holding in *Cargill* to the facts before it. Petitioner quarrels with a phrase in the court's typescript opinion (Appendix A to Petition, at A 4) that "[t]he district court erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likeli-

hood of *having suffered* an antitrust injury." (Petition at 5, 14) This statement, however, was changed in the court's final published opinion to require that petitioner have demonstrated "a substantial likelihood of suffering an antitrust injury," as a result of the formation of Qualex. 842 F.2d at 98 (A 4). This change makes the phrase consistent with the court's clear conclusion:

> *Cargill* has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff *will be* injured. Proof that an entity *will commit* bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

842 F.2d at 102 (A 12) (emphasis added).

Under this correct standard the court of appeals examined each of petitioner's claims that it would be injured as a result of alleged anticompetitive conduct after the formation of Qualex. The very fact that the court considered each of these issues makes it clear that it did not require petitioner to show that it had already been injured.

Petitioner is also incorrect in asserting that the court below held that a competitor may not challenge "monopolistic conduct forcing it from the market." (Petition at 8) Rather, the court held that "to obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will

be injured." 842 F.2d at 102 (A 12). It found that, as a matter of fact, not theory, petitioner had failed to demonstrate a substantial likelihood of success in establishing that it was threatened with an antitrust injury arising out of any of the alleged anticompetitive conduct petitioner claimed would flow from the formation and operation of Qualex. 842 F.2d at 100-101 (A 7-10). In particular, the court considered whether petitioner had established a substantial likelihood that it was threatened with alleged predatory pricing by Qualex. The court concluded that, as a matter of fact, petitioner had failed to provide the evidence that this Court held in *Cargill* would give it standing, and in fact had shown the contrary. 842 F.2d at 99-100 (A 7-8).

With respect to petitioner's claim that Kodak was discriminating against it in the sale of paper and chemicals the court of appeals correctly concluded that the new venture would not sell paper and chemicals, and that as a result any claim for price discrimination was independent of any claim against the venture that petitioner sought to enjoin.[12]

Petitioner argues that a high market share by the merged firm is sufficient to confer standing on a competitor. The court below correctly held, however, that to enjoin a merger, a competitor must show that it is threatened by monopolistic *conduct* and not merely allege that the merged firm will

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[12] The court below also considered a variety of claims not dealt with by the district court, including petitioner's claims that it was threatened with antitrust injury arising out of alleged limit pricing, massive advertising, and foreclosure of independent couriers. The court concluded that these claims either did not involve conduct of Qualex or had not been proved. 842 F.2d at 101 (A 9-11).

None of these points are addressed by Phototron in its petition as a basis for granting the writ.

possess a market share sufficient to evidence monopoly power. Market share alone does not constitute unlawful monopolization. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

The principal concern of merger law is that excessive concentration of the market will lead to an increase in price to consumers above the competitive level. This concern is the same whether the market contains several large firms or one. In either case, the fact remains that a competitor such as petitioner cannot be harmed by even an illegal merger in the absence of predatory conduct directed at it, because an increase in price can only benefit a firm that is already in the market. *See* Note, *Horizontal Mergers, Competitors and Antitrust Standing Under Section 16 of the Clayton Act; Fruitless Searches for Antitrust Injury*, 70 Minn. L. Rev. 931, 948 (1986).

Moreover, requiring a competitor-plaintiff to show a threat of monopolistic conduct ensures that the competitor is a proper plaintiff and not simply manipulating the antitrust laws to impede competition. "Courts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors." *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987); *see also Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); Baumol and Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247 (1985); Hovenkamp, *Merger Action for Damages*, 35 Hastings L. Rev., 937, 956 (1984).

Thus, as the court below held, petitioner needed to show something more than Qualex's market share.[13] It did not do so. A competitor's standing to challenge a merger between its competitors does not vary based on the merged entity's market share, but rather, as the Court made clear in *Cargill*, turns on whether the competitor will suffer "antitrust injury" as a result of the merger. This requires a showing that predatory behavior by the combined entities is likely to be directed at competitors. There was no such a showing in this case.

The decision of the court of appeals will not, as petitioner contends, impair private enforcement of the merger laws. The decision below does not impose restrictions more onerous than *Cargill*, which itself recognized a role for the competitor-plaintiff under appropriate circumstances. And nothing in *Cargill* or in the decision below affects the right of suppliers or customers of the merged firm to challenge a suspect combination. In the four months from the public announcement to the closing of the transaction in this case no customer, no supplier, and indeed no governmental agency, has asserted any antitrust harm flowing from respondents' venture.

As is apparent from the foregoing discussion, petitioner's true disagreement with the court below is not on the law, but on that court's interpretation of the evidence in light of *Cargill*. Rather than resolving any important legal controversy, the court of appeals simply found that petitioner was not entitled to injunctive relief at this preliminary stage of the proceedings because petitioner's evidence was insufficient to establish a credible threat of predatory conduct, but

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[13] The suspect "wholesale photofinishing" market that was found by the district court was questioned by the court below. See note 2, above.

rather affirmatively demonstrated that no such threat was present. This Court does "not grant certoriari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981). Given the absence of conflict between the decision of the court below and that of any other court, as well as the lack of an important legal controversy, a writ of certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX I

PHOTOTRON CORPORATION,
Plaintiff-Appellee,

v.

EASTMAN KODAK COMPANY,
Fuqua Industries, Inc., and Colorcraft Corporation,
Defendants-Appellants,

No. 88-1128.

United States Court of Appeals,
Fifth Circuit.

March 28, 1988.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Eastman Kodak Company ("Kodak"), Fuqua Industries and Colorcraft Corporation appeal the granting of a preliminary injunction against Kodak's merger with Colorcraft Corporation, a subsidiary of Fuqua Industries, Inc. After reviewing the record and carefully considering the arguments presented by the parties we reverse the order of the district court.

Facts

The defendants in this action, Colorcraft and Kodak, have reached an agreement to combine their photofinishing facilities throughout the United States. Colorcraft operates forty-

one film processing plants, and Kodak has fifty such labs. The plaintiff in this suit, Phototron, processes film at nine plants in the southern and western United States.

These plants provide processing for amateurs' photographic film; Colorcraft, Kodak and Phototron have accounts with large and small retailers who receive film directly from the public. More than ten years ago, the photo processing market offered consumers two choices: either give film to a retailer who would then send the film to a wholesale processor, or use a mail-order service. The recent appearances of photo minilabs and of a trend toward vertical integration by large retailers such as Eckerd Drugs and Wal-Mart have significantly changed market relationships. Although the parties dispute the proper definition of the relevant market for this antitrust action, certainly many consumers — enjoying the wider range of options brought by advancing technology — have altered the manner in which they have their film processed. The more impatient customers, for example, pay extra for the convenience of having their film back in an hour. In 1980, there were few minilabs in operation; today there are over 12,000. As affidavits in the record show, by 1986 minilabs accounted for thirty percent of the entire value and twenty-two percent of the volume of photofinishing services.

Wholesale labs have had to adapt to these changing market circumstances. Colorcraft now processes most of its orders overnight. Some large general retailers have chosen to integrate by installing minilabs on their premises. Many customers are no longer willing to wait a week for their pictures. Against this backdrop, Kodak and Colorcraft have agreed to merge their photofinishing facilities.

Proceedings

Phototron Corporation brought this action seeking, in part, to enjoin the merger of Kodak's and Colorcraft's photofinishing labs.[1] The district court granted a hearing in early February to consider Phototron's application for a preliminary injunction. At the request of the district court, the merger was postponed until February 23, 1988; and on February 22 the district court granted a preliminary injunction.

The record before the district court consisted of affidavits filed by the parties and the oral arguments heard in early February. In his Memorandum Opinion, Judge Mahon found that:

(1) Phototron has standing to challenge the merger;

(2) wholesale photofinishing is the relevant market;

(3) the merger may substantially lessen competition in the relevant market;

(4) the grant of preliminary injunction is appropriate given the threat of loss and damages Phototron may suffer.

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[1] Kodak and Fuqua filed pre-merger notification materials on December 7, 1987 with the FTC and the Antitrust Division of the Justice Department pursuant to the Hart-Scott-Rodino Act. Phototron filed this action on December 21, 1987, three days before the FTC cleared the merger. In its complaint, Phototron alleges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 7 of the Clayton Act, 15 U.S.C. § 18, and state law. For relief, Phototron seeks $100 million in actual damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and an injunction under Section 16 of the Clayton Act.

Issues

Kodak challenges the district court's rulings on standing and the relevant market. Our decision on the standing issue, however, forecloses the need to take up the more difficult relevant market issue.

Before setting forth the strict standing requirements, we remind ourselves of a well established principle: a preliminary injunction can be granted only when the district court has found "a substantial likelihood that plaintiff will prevail on the merits." *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974). One of the merits issues that must be decided at trial is whether Phototron has suffered an antitrust injury, for without such an injury, Phototron lacks standing to sue. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. ——, ——, 107 S.Ct. 484, 491, 93 L.Ed.2d 427, 438 (1986). The district court therefore erred in handing down a preliminary injunction without first finding that Phototron had demonstrated a substantial likelihood of suffering an antitrust injury. The district court correctly noted that no rigorous proof of antitrust injury was necessary at this early stage of consideration.[2] Given the onerous effects of granting a preliminary injunction, however, more than mere pleading is necessary to establish standing even at this stage. Because the district

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[2] The district court stated:

> Only the issue of *preliminary* injunctive relief is before the Court . . . . Phototron must allege an antitrust injury which flows from the proposed Kodak-Colorcraft combination and sustain only that burden of proof which would entitle it to *preliminary*, not permanent injunctive relief.

Mem. Op. at 15.

court determined that the pleadings sufficed standing alone,[3] we must, at the least, remand the case for a determination whether there is a substantial likelihood that Phototron will be able to prove antitrust injury at trial. Given the need for us to render a final decision on this issue, we look beyond a remand and review the record to determine whether we can make the "substantial likelihood" determination ourselves.

In *Cargill*, the Supreme Court decided that a competitor could obtain a permanent injunction against a merger by meeting the same standing requirement that the Court articulated earlier in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). *Brunswick* allows treble damage recovery under Section 7 of the Clayton Act only when plaintiffs have shown antitrust injury:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

429 U.S. at 489, 97 S.Ct. at 697.

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[3] The district court initially indicated that it would decide whether Phototron was likely to succeed on the standing issue.

> Phototron has made the requisite allegations in its Complaint and, as will be seen in Part II(b) of this Opinion, made the applicable showing required for equitable injunctive relief.

Mem.Op. at 15-16. Part II(B), however, never addresses the standing issue, but rather focuses only on the likelihood of success on the statutory claims. The merits of any case embody several elements that the plaintiff must prove to prevail at trial. In this case, those elements are: 1) standing, 2) establishing the relevant market, and 3) one or more of the substantive claims (e.g. Clayton Act § 7, Sherman Act §§ 1 and 2).

This burden on the private plaintiff is a significant one, and the Supreme Court's decision to make it such was aptly noted in Justice Stevens' dissent in *Cargill*:

> This case presents the question of whether the antitrust laws provide a remedy for a private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the post merger conduct of the merging firms and deny relief unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path.

479 U.S. at ____, 107 S.Ct. at 496, 93 L.Ed 2d. at 443-44. Bound by precedent, we follow the Supreme Court's tracks.

Under *Cargill*, a competitor of two merging entities has standing to challenge the merger if an allegation and proof of predatory pricing is made. In its complaint, Phototron alleges that Kodak and Colorcraft have provided photofinishing services at below cost; specifically, the complaint asserts that the companies have been operating their wholesale labs "unprofitably or at substantially reduced profit margins for at least the short term, until plaintiff is forced to go out of business or sell to defendants or their surrogates." "Operating ... at substantially reduced profit margins," however, is not equivalent to pricing in a predatory manner, it is simply pricing in a competitive manner. An allegation that one is operating "unprofitably" comes close to alleging predatory

pricing.[4] We withhold a determination of how precisely predatory pricing must be alleged in order to assert an antitrust injury, turning instead to the easier conclusion that Phototron has not demonstrated a substantial likelihood of prevailing on its allegation at trial.

Phototron alleges carefully that Kodak and Colorcraft were operating unprofitably because they "have charged prices for photofinishing services to actual and potential retail customers of plaintiff that are substantially below the prices *plaintiff* can charge and still operate profitably" (emphasis added). The sentence's conclusion does not, of course, necessarily follow from its stated premises. To satisfy the "substantial likelihood" requirement for preliminary injunctive relief, Phototron must present some evidence that Kodak or Colorcraft has sold photofinishing services below *its* cost. In his affidavit, the president of Phototron asserts that Kodak and Colorcraft have been able to undercut the price Phototron offers retailers by "operating at a loss, or [ ] receiving discounts from Kodak on color print paper or chemicals." This "evidence" — sufficient in form for this matter in limine — merely restates the allegation. It affords no showing that Kodak or Colorcraft are actually doing that which Phototron suspects they are doing. To the contrary, Phototron offered evidence of Colorcraft's profitability in 1986, and the price of developing through Kodak labs is among the highest

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[4] Kodak urges us to find that "operating unprofitably" is not sufficient for asserting predatory pricing. Our Circuit defines predatory pricing as pricing below marginal or average variable cost. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.), *cert. denied*, 469 U.S. 833, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984). The Supreme Court has not given a pinpoint definition of predatory pricing; it has thus far settled for the vague term "pricing below cost."

in the industry.[5] We see no likelihood that Phototron would prevail on the merits of its predatory pricing allegation; much evidence, however, suggests that it would not. Accordingly, Phototron has failed to establish standing under a predatory pricing theory.

Phototron argues that other evidence of predatory behavior by Kodak and Colorcraft constitutes antitrust injury. Although the district court made no such findings, we shall address Phototron's concerns individually.

1. *Threat of Monopolistic Behavior*

Phototron boldly asserts that "[t]he competitor of a monopolist always has standing to challenge the monopolistic conduct forcing it from the market." This facially sensible proposition has been undermined by *Cargill*. In *Cargill*, the Court required that the plaintiff not simply be a competitor of an alleged monopolist; rather, the plaintiff must show antitrust injury. Phototron suggests that the merits of the Kodak-Colorcraft merger are an important consideration in determining standing. As its brief forcefully states: "The monopoly created by the combination of the two largest current competitors clearly threatens to destroy any remaining competitors, including Phototron. Certainly the antitrust laws, which prohibit monopolies, allow a competitor that will be destroyed by a monopolist to use those laws for protection." As Justice Stevens noted in his dissent in *Cargill*, however, the Supreme Court will not grant relief if there is

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[5] Fuqua's 1986 Annual Report — which was submitted in evidence by Phototron — states that "Colorcraft's earnings increased for the fifth consecutive year, up 33% in 1986 and 12% in 1985.... Profit margins as a percentage of sales declined in 1985 because of the acquisition of Berkey operations but improved in 1986 primarily from economies gained by eliminating duplicate expenses of Colorcraft and Berkey."

simply "a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete." 479 U.S. at ——, 107 S.Ct. at 496, 93 L.Ed.2d at 444. Therefore, the notion that merely facing the specter of a monopoly is enough to create standing in a competitor is not the law.

2. *Massive Use of Advertising*

Phototron urges us to find that massive use of advertising and promotion by the merging companies will exclude competition. Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent. "A monoplist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2nd Cir.1979).

Phototron supports its advertising injury assertion by pointing to the "advertising-driven Colorwatch program." Despite its complaints regarding the Colorwatch system,[6] Phototron has failed to provide any evidence showing that it has a substantial likelihood of proving this injury at trial. Colorwatch is *not* advertising by the wholesale photofinishers; it is a marketing program aimed at the public through retailers but undertaken by a supplier of materials to whole-

[6] "Colorwatch" is a service mark that retailers display indicating that customers may have their film sent to participating Colorwatch processors where film is developed under quality standards on Kodak-brand paper. A Colorwatch wholesale processor must abide by the quality standards set by Kodak and only use Kodak paper and chemicals in its plant. Of course, other plants operated by the wholesaler may use any paper and chemicals it chooses, even Kodak supplies. No special discount is given by Kodak on paper and chemicals to Colorwatch participants.

sale photofinishers. In this instance, the supplier happens to be Kodak. Phototron certainly would not attempt to stop this merger if Colorwatch were instead a marketing system developed by another supplier of paper and chemicals to wholesale photofinishers. Even more revealing, the success of wholesale photofinishing is not tied to being a participant in Colorwatch: Colorcraft has been enormously profitable in the past few years when it has *not* been a member of the Colorwatch program. Phototron may have a monopoly or price discrimination action against Kodak as a manufacturer of chemicals and paper, but it cannot use the perceived anticompetitive effects of Colorwatch to challenge this merger. Without evidence of how advertising in the wholesale photofinishing industry can act as a barrier to Phototron's participation in the industry, we cannot conclude that Phototron is likely to succeed on this theory of predation.

3. *Limit Pricing*

Setting one's price at a level just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry is often referred to as "limit pricing." As noted in *Dimmitt Agri Industries, Inc. v. CPC Intern, Inc.*, 679 F.2d 516 (5th Cir.1982), this practice clearly evinces monopolistic intent. In *Dimmitt*, the plaintiffs introduced clear evidence that "the company was out to exclude other competitors from the market." 679 F.2d at 524. Kodak contends that, as a matter of law, a company already competing in an industry can never allege limit pricing in order to establish antitrust injury because "a limit price, like a monopoly price, is still set at a supra competitive level[;] it can never hurt a competitor that is already in the market." We defer judgment on this contention to a later time. Nonetheless, no evidence in the record supports the allegation of

limit pricing, and, as we have said above, without more than a mere allegation, Phototron cannot have standing.[7]

4. *Independent Carriers*

Phototron contends that the merger will deny competitors access to the market by foreclosing access to independent couriers. This argument clearly lacks merit. Although Kodak will be able to suspend its use of much courier service when it combines its operations with Colorcraft, Phototron will suffer no injury. The courier industry requires neither a large capital investment nor a large consumer base. Newspaper delivery boys are as available in Bugtussle, Texas, as they are in Los Angeles, California. Phototron has presented no evidence to the contrary.

5. *Vertical Integration*

Kodak's domination of the color film and color print paper and chemicals markets is the final source of injury that Phototron asserts. Phototron argues that Kodak's dominant position in the supply markets will allow it to "manipulate prices and other terms of sale of these products so that independent wholesale photofinishers are at a distinct disadvantage in competing with wholesale photofinishers owned or controlled by Kodak." Phototron's fear of price discrimination is understandable; its attempt to address this fear by stopping this merger is, however, misdirected. If Kodak is

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[7] Phototron's president claims that Kodak has stated to some of Phototron's major retail accounts that "Phototron will be sold or will go out of business." This speculation by Kodak is not proof of limit pricing; it may simply be a recognition that Phototron is no longer a viable competitor. Antitrust laws protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962).

manipulating prices on the sale of its paper and chemicals to customers, then a price discrimination suit should be brought against Kodak, not against this merging entity.

Conclusion

Cargill has imposed significant barriers to competitor attempts to enjoin merger transactions. To obtain a preliminary injunction, competitors must now supply evidence of predatory behavior demonstrating a substantial likelihood that the plaintiff will be injured. Proof that an entity will commit bad acts is difficult to provide at the preliminary injunction stage. This is not to say, however, that once those bad acts occur, relief cannot be had. The antitrust laws provide treble damage recovery for competitors who successfully attack anticompetitive activities.

Preliminary injunctions are extraordinary remedies. The Supreme Court has recognized the danger of granting injunctive relief to parties who are not injured by a merger. That concern, expressed in *Cargill*, must inform our decision today. The order of the district court is

REVERSED.